

**Regulatory Capture and the Marginalized Majority:  
The Case for the Constitutional Protection of the Majority's Disposable Income**

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**Abstract**

The constitutional protection of private property is rooted in the notion that individual rights ought to be insulated from the tyranny of the majority. However, as public choice theory teaches us, democratic decision-making suffers from another systemic failure that is no less pernicious, no less ubiquitous, but less transparent: interest groups are capable of steering government to favor their narrow interests at the expense of diffuse citizens and the broad public interest. In this Essay we argue that this ‘capture’ characteristically results in anticompetitive regulatory measures that inflate the prices of products and services above their competitive market price or reduce their quality. Such measures transfer wealth from the many to the few, as they diminish the value of diffuse citizens' disposable income in terms of purchasing power. We propose to conceive of this loss as a potentially unconstitutional taking of the diffuse citizens' property. Our account challenges the Madisonian assumption, embedded in the Constitution, that constitutions must protect the property rights of the propertied minority against the tyranny of the deprived majority. We argue that the Constitution must also limit another type of taking, effected when a minority solicits anticompetitive government measures that diminish the value of the disposable income of the marginalized majority. Accordingly, anticompetitive regulation catering to special interests will be deemed *prima facie* unconstitutional unless it is necessary to promote public purposes.

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## Introduction

The constitutional protection of private property is rooted in the notion that individual rights and liberties ought to be protected against the tyranny of the majority. James Madison, who viewed the protection of property as a key object of republican government,<sup>1</sup> was ostensibly guided by a concern that majoritarian rule will systematically fail to protect the interests of the propertied minority. Madison cautioned that, while questions of public policy must be determined by the will of the majority, the "majority may trespass on the rights of the minority,"<sup>2</sup> and stressed that "In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger."<sup>3</sup>

However, studies in public choice theory teach us that the democratic political process suffers from another systemic weakness which may be no less pernicious, no less ubiquitous, but less transparent than the majoritarian failure that Madison had anticipated. As interest group theory has exposed, the diffuse public is limited in its capacity to affect public decisions through the public political process, while concentrated interest groups possess an unequaled ability to 'capture' lawmakers and regulators and steer them to shape public policy that favors their narrow interests at the expense of the broad public interest.<sup>4</sup> Therefore, conversely to Madison's view, in the ubiquitous cases where a *minority* is united by a common interest or passion, the rights of the *majority* are likely to be in danger.

The takings jurisprudence of the U.S. Supreme Court is aligned with the spirit of Madison's counter-majoritarian conception of constitutional property rights, focusing on the taking of private property of one or a few owners for the pursuit of a public interest.<sup>5</sup> The Court has long held that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>6</sup> Considering the lessons of interest group theory, this Essay argues that the constitutional protection of private property should sometimes serve the opposite purpose – namely, to bar government from unjustly imposing economic injuries on the *public* in the pursuit of *special interests*.

This contention, if correct, should lead us to reexamine what kinds of private interests ought to be conceptualized as amounting to constitutionally protected property rights, and when and how government measures imposing burdens on those rights ought to pass judicial muster for their constitutionality. The Essay proposes such a reconceptualization, arguing that anticompetitive government measures that are motivated by special interests' capture should be conceptualized as potentially unconstitutional takings of diffuse citizens' private property. Such measures tend to result in massive transfers of wealth from the many to the few, as they diminish the disposable

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<sup>1</sup> JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 16 (1990).

<sup>2</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 9-10 (Marvin Meyers ed., 1973).

<sup>3</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787 135 (Max Farrand ed., 1907).

<sup>4</sup> MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

<sup>5</sup> That the focus is on real property is highlighted in *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 61.

<sup>6</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The 'Armstrong principle' received a remarkable degree of assent across the spectrum of opinion – see William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153-1154 (1997).

income of the diffuse majority in terms of its purchasing power (i.e. the quantity and quality of products and services that can be purchased with a unit of currency). We suggest that the value of disposable income in terms of purchasing power must be conceived as constitutionally protected property, and that anticompetitive government measures that diminish it to the benefit of special interests, should be conceptualized as effecting its unconstitutional taking if not justified as necessary to promote a public purpose. Furthermore, we suggest that such a conceptualization should give rise to judicial review that could effectively preempt the adverse influences of special interest groups on government.

Other scholars have suggested that interest group theory justifies and makes desirable more rigorous judicial review. Among others, Erwin Chemerinsky suggested that the executive and legislative branches' proneness to capture warrants more rigorous judicial review,<sup>7</sup> and Cass Sunstein argued that the courts should invalidate legislation that benefits certain groups resulting solely from their ability to obtain it by exercising raw political power.<sup>8</sup> The novelty in our approach is that we, for the first time, give a 'name' to a specific type of a ubiquitous if inconspicuous type of government-imposed wealth transfer that caters to special interests at the expense of the diffuse public, bringing it under the framework of the constitutional protection of private property and thereby justify more rigorous judicial scrutiny of its manifestations. The conception of individuals belonging to the diffuse public as bearers of rights, protecting them against the taking of their private property by anticompetitive regulation, provides these individuals with voice where they are not heard and standing to demand judicial review as a mechanism that could assist them in overcoming the debilitating collective action problem that they face.

Our innovation adds constitutional underpinnings to those antitrust scholars who suggested to apply federal antitrust law to anticompetitive government measures.<sup>9</sup> However, we believe that constitutional law is the appropriate framework to address such measures as they pertain to the systemic failures of the democratic process. Constitutional protection is required to limit the discretion of legislators who define the scope of antitrust law as they actively seek to attract special interests.

The Essay proceeds as follows: Section I, discusses the problem of anticompetitive government measures designed to favor special interest groups at the expense of the diffuse public. Section II provides the justification for conceptualizing anticompetitive government measures as potentially unconstitutional takings of diffuse citizen's property: Section II(a) establishes that such measures could be seen as government-imposed transfers of wealth which diminish the property of the diffuse public; and section II(b) argues that, in contrast with other conceivable types of government-imposed wealth transfers, anticompetitive government measures are worthy of more

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<sup>7</sup> Erwin Chemerinsky, *The Supreme Court, 1988 Term-Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46-47, 78, 80-81 (1989).

<sup>8</sup> Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); on the need for more rigorous judicial review in light of interest group capture see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980); BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265-303 (1980).

<sup>9</sup> See John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 748 (1986); see also William H. Page, *Antitrust, Federalism, and the Regulatory Process*, 61 B.U. L. REV. 1099, 1109-15, 1122-25 (1981).

rigorous judicial scrutiny, as the vulnerability of diffuse citizens to the systemic failures of the political process merits constitutional protection of their property interests. We argue that our justification, focused on the failures of the political process, is supported by the original understanding of the constitutional protection of private property, which was guided by the Framers' concerns about a political majority abusing its power against the propertied minority. Section III will propose and discuss a framework for constitutional protection of the diffuse public's property as well as the appropriate tests for judicial review of anticompetitive government measures. We shall suggest the such measures should be invalidated if they result from special interest influence and if they are not necessary to promote their purported public purpose. Section IV concludes.

## **I – Interest Group Theory and Anticompetitive Government Measures**

Economic regulation is inescapably involved in allocating and reallocating burdens and entitlements across society. Some allocative effects are caused by direct physical interference with economic interests, such as the physical taking of private land for public use, while others are caused by indirect interference with economic interests through regulation and macro-economic policy. Low exchange rates may serve the interests of exporters at the expense of importers; decreasing the corporate tax rate may serve the interests of businesses while harming the interests of those favored by extensive public services; some regulations may serve broad public interests in health and safety while imposing high compliance costs on businesses; and some regulations may limit commercial competition placing increased costs on consumers.

Under a traditional account of government regulation, such allocative effects are the product of policy choices aimed at pursuing public interests determined by the democratic political process and public-spirited lawmakers and state executives. However, while this account may serve as a fair normative theory of how government ought to function, studies in public choice theory suggest that it fails as a positive account of the actual behavior of lawmakers and state executives. Under the public choice account of regulation, policymakers are seen as self-interested agents that are often incentivized to be more responsive to narrow special interest groups than to the broad public. As George Stigler suggested, that is because groups that stand to win or lose the most from government action are incentivized to make the greatest effort to 'capture' policymakers and regulators in order to ensure that regulation serves their narrow interests.<sup>10</sup>

Mancur Olson's theory of collective action<sup>11</sup> provided the explanation for why Stigler's findings could be generalized: smaller groups are more likely to succeed at shaping favorable public policies by capturing policymakers, at the expense of the larger groups that try to shape policy through the political system.<sup>12</sup> Olson demonstrated that the problem of collective action arises

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<sup>10</sup> GEORGE STIGLER, *THE THEORY OF ECONOMIC REGULATION* (1971). On capture theory see also: MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1977); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916* (1963).

<sup>11</sup> See Olson, *supra* note 4; see also: Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976).

<sup>12</sup> See RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* (1987).

when large groups attempt to produce a public good which will be accessible to all of its members. That is because Individual members of the group, being rational and intent on pursuing their self-interest, will seek to enjoy the fruits of the joint enterprise at the lowest possible investment of their own personal resources. The more the group is large and homogenous, the less its members are incentivized to contribute to the joint enterprise, as they are aware that if other members succeed in bringing about the desired result, they would be able to reap the benefits while avoiding the costs. In contrast, when a concentrated interest group attempts to promote a shared interest that would produce benefits accessible only to its members, it will succeed in overcoming the collective action problem. Individual members of the group would be sufficiently incentivized to invest resources in the joint enterprise, as the reward would be more valuable per capita, and the small size of the group would reduce the costs of monitoring and imposing sanctions on members who do not contribute to the effort.

Members of the diffuse public face a collective action problem when they seek to shape public policies or at least obtain information on public decisions affecting their interests.<sup>13</sup> Because members of the broad public make up a large and diffuse group, they have a low per capita incentive to invest resources in collecting information on public decisions, and much less so to invest time in active participation in the public political process. As Anthony Downs observed, the resulting information gaps between voters and representatives are the primary problem in representative democracy.<sup>14</sup> Generally speaking, diffuse voters are not familiar with the processes of public decision-making and with particular decisions affecting their interests, nor are they capable of assessing the reasons and justifications behind particular decisions. At the same time, concentrated interest groups are uniquely capable of overcoming the same collective action problem, due to their small size and particular interests. They can thus take advantage of the information gaps between the broad public and its representatives, and even exacerbate those gaps by influencing the media, and effectively invest resources in lobbying, campaign finance or other forms of support or retaliation that may impel decision-makers to sway public decisions in their favor.<sup>15</sup>

By capturing public decision-makers, interest groups regularly shape regulations and macro-economic policies that restrain existing or potential competition. They can steer policymakers to impose restrictions on international or interstate trade, establish licensing regimes or other rules that limit or impose high market entry costs on new entrants,<sup>16</sup> limit the quantity of output or set the prices of certain goods, enact rules that allow competitors to coordinate prices, or enact legislation exempting certain industries from antitrust laws. Such measures artificially increase the market power of interest groups and allow them to engage in monopolistic behavior, charging supra-competitive prices or reducing the quality of the goods and services that they produce or trade. These, in turn, result in massive transfers of wealth from the many to the few, by increasing

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<sup>13</sup> Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809-12, 820-26 (1998).

<sup>14</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

<sup>15</sup> This understanding was further developed by Elinor Ostrom, who exposed the nature of successful cooperation relating to resources that are accessible to only to particular groups. See: ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

<sup>16</sup> Simeon Djankov et al., *The Regulation of Entry*, 117 Q.J. ECON. 1, 35 (2002).

profits for the favored interest groups and reducing the value of the disposable income of diffuse citizens in terms of purchasing power.

Cases of public restraints of competition influenced by special interests are very common and well documented: Gabriel Kolko argued in 1963 that federal regulation between 1900-1916, which was commonly seen as pursuing public progressive interests, was to a great extent influenced by business interests in curbing competition;<sup>17</sup> A study by Ralph Nader published in 1973 found extensive anticompetitive effects of federal regulation in the fields of communication, energy, transportation and others;<sup>18</sup> In his seminal work describing the economic theory of regulation, George Stigler exposed the ways in which the interest group of railroad companies used state authority to preempt competition from truck drivers in the early 1930's;<sup>19</sup> In 1980, Congress passed legislation authorizing certain vertical restraints on competition in the soft drink industry, influenced by soft drink bottlers such as 'Coca-Cola' and 'Pepsico' who sought immunity from antitrust law in response to Federal Trade Commission (FTC) litigation against them;<sup>20</sup> In the early 2000's auto dealers succeeded in restraining competition by attaining legislation in all 50 states prohibiting direct vehicle sales by manufacturers and online sellers without a franchise presence,<sup>21</sup> and real estate brokers successfully lobbied for state laws and regulations barring professionals from offering limited brokerage services for lower fees instead of full package services, and preventing brokers from passing part of their commissions to consumers;<sup>22</sup> In 2003, the pharmaceutical industry invested \$116 million in convincing Congress to ban Medicare from negotiating for lower drug prices, resulting in an estimated transfer of \$90 billion per year from consumers to the pharmaceutical industry.<sup>23</sup> To be sure, these are only a few representative examples.

Extant law exacerbates the problem of anticompetitive government measures as it immunizes public competition restraints, and private parties acting in accordance with them, from antitrust law, leaving no legal tools at the hands of consumers or competitors that could be used to challenge anticompetitive government measures detrimental to their interests. Several Supreme Court decisions have affirmed that federal regulations prevail when conflicting with antitrust law,<sup>24</sup> and the antitrust “state action doctrine”, first established in the 1943 case of *Parker v. Brown*,<sup>25</sup> holds that the Sherman Act does not apply to competition restraints produced by official state action,

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<sup>17</sup> GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916* (1963).

<sup>18</sup> *THE MONOPOLY MAKERS: RALPH NADER'S STUDY GROUP REPORT ON REGULATION AND COMPETITION* 35, 103, 193, 227, 319 (Mark J. Green ed., 1973).

<sup>19</sup> George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 8 (1971).

<sup>20</sup> Leonard R. Stein, *The Soft Drink Interband Competition Act of 1980: Antitrust Loses Its Fizz*, 18 *HARV. J. LEGIS.* 91 (1981); A.B.A. SECTION OF ANTITRUST LAW, *FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW* 49-50 (2007).

<sup>21</sup> Timothy J. Muris, *State Intervention/State Action - A U.S. Perspective*, *FORDHAM CORP. L. INST.* 517, 520 (2004).

<sup>22</sup> Letter from the FTC & the Dep't of Justice to Gov. Matt Blunt (May 23, 2005); Letter from the FTC & the Dep't of Justice to Loretta R. DeHay, Gen. Counsel, Tex. Real Estate Comm'n (Apr. 20, 2005).

<sup>23</sup> TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 56 (2018).

<sup>24</sup> See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 279-84 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

<sup>25</sup> 317 U.S. 341 (1943).

provided that they are part of a 'clearly articulated' state policy and are actively supervised by the state.<sup>26</sup> The *Parker* doctrine is based on principles of state sovereignty and federalism. In the *Parker* decision, the Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature".<sup>27</sup> In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court reasoned that "The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators."<sup>28</sup>

Besides the *Parker* doctrine, the corollary *Noerr-Pennington*<sup>29</sup> doctrine holds that "the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government."<sup>30</sup> The doctrine, based on the premise that antitrust laws may not impinge upon First Amendment rights to petition government, exempts private parties from antitrust liability even if they seek anticompetitive government measures with anticompetitive intent or by wrongful conduct.<sup>31</sup>

The immunity government measures could confer upon interest groups wishing to engage in anticompetitive practices makes such measures all the more valuable for interest groups and increases their incentive to influence government. As the former chair of the FTC, Timothy Muris, stated:

"Protecting competition by focusing solely on private restraints [as antitrust law does] is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take."<sup>32</sup>

Interestingly, the *Parker* and *Noerr-Pennington* doctrines could help demonstrate why federal antitrust law is ill fitted to address the problem of anticompetitive government measures, not just as a matter of law, but also as a matter of legal theory. As the Supreme Court once stated, "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics."<sup>33</sup> Indeed, we believe that rather than antitrust laws, anticompetitive government measures aimed to favor interest groups ought to be addressed by constitutional law, a body of law precisely intended to regulate politics. The problem we are addressing raises essentially

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<sup>26</sup> *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

<sup>27</sup> 317 U.S. at 350-51 (1943).

<sup>28</sup> 499 U.S. 365, at 374 (1991).

<sup>29</sup> *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>30</sup> 499 U.S. at 379-80.

<sup>31</sup> *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 859 (5th Cir. 2000) ("Noerr-Pennington immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent."); *Armstrong Surgical Ctr., Inc. v. Armstrong County Memorial Hospital et al.*, 185 F.3d 154, 162 (3rd Cir. 1999) (stating that remedy for bribery, fraud, or deceit lies with laws that forbid such conduct, and cannot be premised on willingness of courts to look behind state action in context of antitrust litigation).

<sup>32</sup> Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CLL. L. REV. 165, 170 (2005).

<sup>33</sup> *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 384 (1991).

constitutional questions concerning the failures of the political decision-making process and the normative constraints on the legitimate use of government power to transfer wealth between groups and individuals.

The issue at hand is constitutional in another important sense. As Tim Wu argues in his recent book, antitrust law plays a "constitutional" role as it was originally aimed to achieve a political goal alongside its economic goal. According to Wu, antitrust was serving as "a check on private power, by preventing the growth of monopoly corporations into something that might transcend the power of elected government to control."<sup>34</sup> Wu turns our attention to the fact that the collective action problem, allowing concentrated interest groups to dominate the diffuse public in obtaining favorable public policy in the first place, is made worse by restraints on competition: as industries become more concentrated they can overcome their collective action problem more easily as fewer players can benefit from reduced coordination costs and increased benefits from the spoils of the desired political outcome.<sup>35</sup> Interest groups could thus use their disproportionate political power to restrain competition, which in turn further increases their political power, in a vicious circle that corrupts the political process and perpetuates the control of private power over public policy.

In what follows, we propose a response to this problem. We argue that such 'captured' government measures should be reconceptualized as potentially unconstitutional takings of diffuse citizens' private property, if they are not justified as necessary to accomplish their purported public purposes.

## **II – Conceptualizing Anticompetitive Government Measures as Potentially Unconstitutional Takings of Private Property**

At the outset, our proposition that anticompetitive government measures could be conceptualized as potentially unconstitutional takings of citizens' private property may seem questionable. We are accustomed to regard constitutional rights as counter-majoritarian constraints on government action, shielding individuals and minorities, and not the broad public, from unjust burdens. At the same time, we tend to view economic competition as the subject of antitrust law that is designed to ensure aggregate economic efficiency and aggregate consumer welfare rather than the protection of individual rights.<sup>36</sup>

However, in this section we argue that anticompetitive government measures could and should be conceptualized as potentially unconstitutional takings of citizens' private property. Our argument is based on the contention that the constitutional protection of private property is designed to

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<sup>34</sup> WU, *supra* note 23, at 54.

<sup>35</sup> *Id.* at 58.

<sup>36</sup> See Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1023 (1987); For a different view the conceives of the Sherman Act as granting consumers property rights over the consumer surplus see: Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2351 (2013).



protect owners against purely private wealth transfers caused by the systemic failures of the democratic process. In section (a), we establish that anticompetitive government measures designed to favor special interest groups could be seen as government-imposed transfers of wealth that enrich interest groups while diminishing the property of the diffuse majority. Then, in section (b), we explain that in contrast with other conceivable types of government-imposed wealth transfers, anticompetitive government measures that transfer wealth from the many to the few by exploiting the political vulnerability of diffuse citizens are worthy of more rigorous constitutional scrutiny. We find support for our argument also in the vision of the Framers of the Constitution whose concerns with the failures of the political process led them to delineate the types of private property interests that the Takings Clause should protect.

*a. Anticompetitive government measures as wealth transfers that diminish the property of the diffuse majority*

Government restraints on competition often result in above-market prices or below-market quality of affected goods or services. Subsequent to such measures, the diffuse group of consumers will have experienced a diminution of the value of their disposable income in terms of purchasing power – their earnings will now allow them to purchase less in quantity and/or quality of the same goods or services they could access before the measures. At the same time, the interest groups favored by anticompetitive measures will reap monopoly profits at the expense of their consumers. In this section, we aim to establish that it is possible to conceive of such effects as government-imposed wealth transfers that diminish the property of diffuse citizens.

This contention raises a conceptual problem. The distributive effect described above is not generated by a government action that directly expropriates wealth from diffuse citizens and allocates it to interest groups, but rather by the indirect modification of market prices. Since competitive markets prices are determined by transactions between willing buyers and sellers in voluntary market transactions, these prices may be viewed as external to the property rights of the parties. While it is true that the currency held by the diffuse citizens is indeed their private property, it would be problematic to suggest that this property right includes an entitlement to exchange some particular amount of their currency in return for a given good. From this perspective, anticompetitive government measures cannot be seen as diminishing private property, and they can hardly be seen as government-imposed wealth transfers, since their distributive effects reflect nothing more than the terms of voluntary transactions between private parties.<sup>37</sup>

However, the notion that market prices are determined by willing buyers and sellers alone serves to obscure the role played by government in affecting prices by defining and enforcing property rights and regulating market activity. Such government actions are involved in determining market prices either by setting them directly or by modifying supply and demand or the relative bargaining powers of the parties. Anticompetitive government measures, by definition, affect deviations from the market prices that would be determined by competitive conditions. These

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<sup>37</sup> This argument may be raised only with regards to anticompetitive government measures that do not directly set prices.

measures restrict the purchasing options of consumers, as a result of granting interest groups the power to artificially inflate prices beyond the level buyers and sellers on an equal footing of bargaining power would have agreed to. Such measures, despite their indirect nature, have clear distributive implications. Such implications are essentially no different from those of direct measures that directly take consumers' money and allocate them to interest groups.

Correspondingly, the diminution of the value of money in terms of purchasing power is conceptually equivalent to the expropriation of money. That is because the money held by citizens is essentially a carrier of purchasing power. For example, if citizens possess \$100, there is no difference between directly taking \$20 away from them or creating an uncompetitive market that inflates the price tag of products such that \$100 would allow them to purchase no more in quantity and quality of goods than \$80 could purchase beforehand. Money, in contrast with other types of possessions, carries no independent value to its owners that cannot be reduced to its exchange value – the value of goods and services it could be exchanged for in the market. Therefore, if physical taking of money is an infringement of property, so is the diminution of its value in terms of purchasing power by artificially inflated prices.

The contention that the right to property in money includes the protection of its value could be found in comparative constitutional law. For example, Hans-Jürgen Papier, a former President of the German Federal Constitutional Court, argued in 1973 that the guarantee of property found in Article 14 of the German Basic Law includes the protection of the value of money against changes in monetary policy, precisely because money is essentially a carrier of purchasing power.<sup>38</sup> This wide-ranging argument was later rejected by the German Constitutional Court, given the impossibility of requiring the state to guarantee the value of money against the numerous factors that shape it.<sup>39</sup> However, that decision is regarded as compatible with the view that the German constitution's protection of private property extends to the responsibility of the state to guarantee the value of money by, inter-alia, maintaining a 'functioning monetary order' and institutionalizing the independence of the central bank, as well as its mandate to ensure price stability.<sup>40</sup> To be sure, the question of whether monetary phenomenon such as inflation or currency devaluation could be seen as infringements of property rights is beyond the scope and purpose of this Essay, which focuses on the effect of anticompetitive government measures on the property rights of the diffuse public.

Our understanding of the relationship between anticompetitive prices and harm to property could also be found in US jurisprudence. In the case of *Reiter v. Sonotone Corp* the Supreme Court found that "a consumer whose money has been diminished by reason of an antitrust violation has been injured in his 'property' within the meaning of § 4 of the Clayton Act,"<sup>41</sup> which provides that persons injured in their "business or property" by anything forbidden in the antitrust laws may sue

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<sup>38</sup> Hans-Jürgen Papier, *Eigentumsgarantie und Geldentwertung*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 528 (1973).

<sup>39</sup> See Isabel Feichtner, *Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become*, 17 GERMAN L.J. 875, 887 (2016); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 31, 1998, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 97, 350.

<sup>40</sup> Feichtner, *supra* note 39, at 887.

<sup>41</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

for treble damages.<sup>42</sup> The Court found that a consumer acquiring goods or services for personal use "is injured in 'property' when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of."<sup>43</sup> While the *Reiter* decision recognizes injuries to property due to inflated prices caused by *private* competition restraints, we see no reason why the same should not hold true in the case of *public* competition restraints.

*b. Constitutional protection of property as a response to purely private wealth transfers effected by the systemic failures of the political process*

So far, we have established that anticompetitive government measures could be seen as effecting government-imposed wealth transfers that diminish the property of diffuse citizens. However, it does not simply follow from this conception that such measures should be considered potentially unconstitutional. After all, many evidently permissible government measures have profound redistributive implications. For example, government may progressively or regressively levy taxes and redistribute resources through spending, it may adopt zoning ordinances or generate public projects that affect the market value of private property, and it may enact labor and consumer protection laws that redistributes wealth by modifying the relative bargaining powers of private parties. While the Court recognized that government measures indirectly diminishing the value of private property may sometimes be considered compensable takings,<sup>44</sup> the 'regulatory takings' doctrine is very limited in its application.<sup>45</sup> as the Supreme Court explained when discussing the limits of mandating compensation for regulatory takings, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>46</sup>

In this section, we argue that in contrast with other government measures that effect wealth transfers, anticompetitive government measures are worthy of more rigorous judicial scrutiny due to their propensity to violate a normative principle at the heart of the constitutional protection of private property – namely, that government actions that transfer wealth between persons in society ought to promote, or be aimed to promote, a public purpose rather than purely private ends. As we shall explain, anticompetitive measures are prone to violate this principle because the property interests of the diffuse majority are susceptible to be harmed by a systemic failure of the political decision-making process - the interest group capture failure.

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<sup>42</sup> The Clayton Act, 15 U.S.C.S. § 15

<sup>43</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

<sup>44</sup> *Pennsylvania Coal Co v Mahon* 260 U.S. 393, 415 (1922) ("if a regulation goes too far, it will be recognized as a taking"). The Supreme Court developed the doctrine of regulatory takings further in *Penn Central Transport Co v. City of New York*, 438 U.S. 104 (1978); *Hodel v. Irving*, 481 U.S. 704 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Kaiser Aetna v. United States* 444 U.S. 164 (1979); *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

<sup>45</sup> The Supreme Court refrained from setting a bright-line test of when regulation diminishing private property "goes too far" but determined that compensation is due for the very limited category of regulations that deny property owners "all economically beneficial or productive use of land." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)).

<sup>46</sup> *Pennsylvania Coal Co v Mahon* 260 U.S. 393, 413 (1922).

The constitutional protection of private property is arguably designed to uphold two important normative limitations constraining the legitimate use of government power to enrich some at the expense of others. First, in the event that a government measure pursuing a public purpose diminishes private property, the Takings Clause may require government to compensate the aggrieved parties such that the burdens of the public measure be "borne by the public as a whole" rather than by "some people alone".<sup>47</sup> Second, and important for our analysis, the Takings Clause is aimed to bar government from effecting purely private wealth transfers, requiring the confiscating or diminishing measure to be aimed at pursuing public rather than purely private ends. According to Cass Sunstein, a central theme of the Constitution and of the Takings Clause is the prohibition of what he terms 'naked preferences' – the use of government power to distribute resources to a certain group solely due to the group's capability of exercising 'raw political power'.<sup>48</sup> As Sunstein writes with regards to the Takings Clause:

"A principal theme of the eminent domain clause cases is that government action cannot be used to serve purely private ends. Taking property from A in order to benefit B is the core example. The text of the clause attests to this theme in the basic requirement that a "public use" be shown before a taking is permitted, even with compensation. The function of this requirement is to prevent purely private wealth transfers".<sup>49</sup>

We contend that anticompetitive government measures are especially prone to reflect the 'naked preferences' of special interest groups that are able to exercise their superior political influence to obtain the measures, allowing them to reap monopoly profits at the expense of the diffuse public. Due to their collective action problem, members of the diffuse public are incapable of exerting countervailing political influence, or even becoming aware of the measures and their distributive implications. In light of that, anticompetitive measures are suspect of effecting wealth transfers that are aimed to serve the private ends of favored interest groups rather than their purported public ends. We therefore argue that more rigorous scrutiny of anticompetitive measures under the constitutional protection of property is warranted, as the diffuse public's property interest in the purchasing power of their disposable income is especially susceptible to injury by the systemic capture failures of the public decision-making process. In section III, we shall outline the contours of the judicial test that we suggest could be used to scrutinize anticompetitive government measures under this framework. Due to the impracticality and arguable undesirability of substantive judicial review of the measures' purported public purposes, our proposed test will be focused on scrutinizing the process that led to their adoption as well as the government's choice of means.

Our argument in favor of more rigorous judicial scrutiny of anticompetitive government measures relies on the contention that the private property interests that require judicially enforced constitutional protection are those most susceptible to be taken by purely private wealth transfers produced by the systemic failures of the public decision-making process. In the remainder of this section, we aim to show that this contention is nothing new. We argue that the constitutional

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<sup>47</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>48</sup> Sunstein, *Naked Preferences*, *supra* note 8.

<sup>49</sup> *Id.* at 1724.

protection of private property was originally designed to respond to systemic failures of the political market.

When James Madison, who initially proposed the Takings Clause, called for the constitutional protection of property and distinguished the types of property interests that warrant heightened constitutional protection, he was arguably motivated by the need to preempt private wealth transfers which he believed would be produced by another type of political market failure – namely, the tyranny of the majority. The opposite and no less pernicious political failure – what may be termed the tyranny of the minority – was simply not apparent at that moment.

Madison's concern with government infringement on private property was tied to his concern with the dangers of partial, self-interested legislation, aimed to favor one interest at the expense of others. Madison's republican ideal of a government pursuing the public good, and refraining from partiality to one interest or the other,<sup>50</sup> ostensibly guided his thought on the relation between government action and private property. According to Jennifer Nedelsky, Madison believed that "Tax policies and economic regulation might have some redistributive consequences, but it should not be their *objective* to benefit some at the expense of others. That was the sort of partial self-interested legislation to be avoided."<sup>51</sup> Recognizing that division into different "sects, factions and interests" is a feature of civilized society, Madison was weary of such "unjust laws" cautioning that under democratic forms of government "Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species."<sup>52</sup>

As his words suggest, Madison's perception of the dangers of partial and interested public action affecting private property were not limited only to physical dispossession of physical property. Madison's political philosophy exhibited a much broader conception of private property which also acknowledged indirect diminutions of value as violations of property rights. For example, in 1786 he argued that paper money "affects rights of property as taking away equal value in land; [and] affects property without trial by jury."<sup>53</sup> As Nedelsky writes:

"Madison did not ... have a simple conception of property as land or even material goods. The "faculties of acquiring property" [the protection of which was, according to Federalist Ten, the first object of government] emphasized a subtle, nonmaterial dimension of property. And the legislative injustice he feared was not straightforward confiscation, but the more indirect infringements inherent in paper money and debtor relief law. Those interferences [...] were both more likely and more invidious because they were less overt violations of property."<sup>54</sup>

Furthermore, as Michael Treanor demonstrates, Madison viewed the constitutional protection of private property as serving a hortatory function, expressing a principle broader than the application

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<sup>50</sup> NEDELSKY, *supra* note 1, at 42-43.

<sup>51</sup> *Id.* at 31.

<sup>52</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 135.

<sup>53</sup> *Notes for Speech at the Virginia House of Assembly, November 1786*, in 2 THE WRITINGS OF JAMES MADISON 280 (Gaillard Hunt ed., 1901).

<sup>54</sup> NEDELSKY, *supra* note 1, at 30.

of its legal protection, which he believed government ought to adhere to - namely, that government should abstain from "unjustly" burdening private economic interests, even indirectly.<sup>55</sup>

However, when Madison set out to include the protection against uncompensated government takings of private property in the Constitution, he ostensibly intended to limit its application only to physical dispossession of physical property interests, and not to indirect diminution, by government regulation and taxation, of numerous other economic interests of private parties.<sup>56</sup> An important question could therefore be raised: If Madison's perception of the dangers of interested government infringements on private property was so broad, why did he choose to constitutionally protect only physical property interests against physical dispossessions?

The answer could arguably be found in Madison's concerns relating to a particular failure of the political process – namely, the majoritarian failure. According to Treanor, Madison's writings and speeches indicate that "he believed that physical property needed greater protection than other forms of property because its owners were peculiarly vulnerable to majoritarian decisionmaking".<sup>57</sup> Madison held that, in general, the procedural and institutional checks and balances provided by federalism were adequate to protect most property interests.<sup>58</sup> For instance he wrote that:

"A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State."<sup>59</sup>

However, according to Treanor, Madison held that physical property interests required more than the procedural and structural protection that sufficed to mitigate the threats of government infringements on other forms of property. Landed interests required heightened substantive protection against infringement because of a majoritarian failure in the political process. Holding that "In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger,"<sup>60</sup> Madison believed that universal suffrage and demographic growth will favor the interests of manufacturers over the interests of landowners in majoritarian decision-making.<sup>61</sup> As he wrote:

"The three principal classes into which our citizens were divisible were the landed, the commercial, and the manufacturing... It is particularly requisite therefore that the interests of one or two of them should not be left entirely to the care or the impartiality of the third."<sup>62</sup>

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<sup>55</sup> William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 819, 840 (1995).

<sup>56</sup> *Id.* at 791-97.

<sup>57</sup> *Id.* at 847.

<sup>58</sup> *Id.* at 841-843.

<sup>59</sup> The Federalist No. 10, at 83 (James Madison).

<sup>60</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 135.

<sup>61</sup> Treanor, *supra* note 55, at 850.; Sunstein, *Naked Preferences* *supra* note 8, at 1691.

<sup>62</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 123.

We may also suggest that emphasis on protection against physical takings is aligned with the counter-majoritarian conception of constitutional protection in another important way. Single government measures that physically take property tend to affect specific individuals such as those who happen to own particular plots of land, while indirect infringements by regulation and macro-economic policy tend to affect much larger groups. Thus, Madison may have held that the latter type of takings does not warrant a constitutional remedy, as he assumed that large groups would be sufficiently capable of protecting themselves against such takings through the regular mechanisms of representative government.

More generally, it could be argued that protecting the minority of landowners from the landless masses was the underlying concern of the framers of the U.S. Constitution. The installation of a complex and diversified system of government, supermajority amendment requirements, and a judicial review mechanism to protect constitutional rights responded to concerns that a landless majority would use its numerical superiority to redistribute property.<sup>63</sup> Many contemporary legal scholars view the same majoritarian failure as the primary source of justification for judicial review.<sup>64</sup>

Madison's decision to grant landed individual interests special constitutional protection was thus ostensibly guided by a criterion focused on political process failure. Madison believed that the primary defect of republican government is the majoritarian failure, and that landed and physical interests are particularly susceptible to be injured by it. He therefore held that these property interests ought to be protected by an institution that is insulated from the majoritarian failures – namely, judicially enforced constitutional property rights. He presumed that the broad public whose property interests could be affected indirectly by government measures was capable of effectively securing its interests through the system of representative government and the structural protections of federalism.

However, Madison did not anticipate the severe systemic failure of interest group capture, that enables interest groups to shape public policy that benefits their commercial interests to the detriment of the broad unorganized public.<sup>65</sup> Interestingly, Madison seems to have become more aware of this failure at a later period, in light of developments related to Alexander Hamilton's economic plans in the 1790s. According to Nedelsky,

"At the time of the convention, Madison devoted almost no attention to the potential threat of the wealthy using their power to promote their own unjust plans. [...] he thought Hamilton's plans for redemption of public securities would unjustly favor wealthy speculators. And he not only opposed Hamilton's plan for the bank as unconstitutional, he

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<sup>63</sup> See discussions of the political structures designed to curb such conflict of interests in: *The Federalist* No. 10 (James Madison); *The Federalist* No. 51 (Alexander Hamilton or James Madison).

<sup>64</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* ch. 6 (1980).

<sup>65</sup> Neil Komesar used the term 'minoritarian bias' to describe this failure. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 269 (1997).

was appalled at the spectacle of men within the government deriving personal gain from governmental measures, and the wealthy successfully exerting pressure from without".<sup>66</sup>

Accordingly, we argue that in light of the political market failure of interest group capture, the property interests of the diffuse citizens are no less susceptible to injury by interested public decisions than the property interests of the minority of landowners are susceptible to injury by majoritarian public decisions. Therefore, both types of property interests require the protection of constitutional property rights enforced by courts, which are not only insulated from the majoritarian failure, but are also insulated from interest group influence to a greater extent than the political branches of government. As Richard Posner noted, judges are better shielded from the pressures of special interests, as they have life tenure, fixed salaries and procedural rules that limit their contact with interest groups.<sup>67</sup>

We therefore suggest that anticompetitive government measures ought to be conceived as potentially unconstitutional takings of diffuse citizens' private property, as they may be aimed to effect purely private wealth transfers rather than to promote public ends. In section III, we shall outline a judicial test that could be used to scrutinize and possibly invalidate anticompetitive government measures if they are not justified as necessary to promoting their purported public purposes.

### **III – The Constitutional Test for Protecting the Majority's Property Against Anticompetitive Government Measures**

In this section, we outline a framework for constitutional protection against purely private wealth transfers affected by anticompetitive government measures and discuss its practical desirability. We shall suggest that anticompetitive measures should be invalidated if special interest influence could be found to be involved in their adoption, and if they are not necessary to promote their purported public purpose. Accordingly, we will present a test for judicial scrutiny of suspect anticompetitive government measures.

As we established above, anticompetitive government measures are particularly suspect of being aimed to serve the private interests of special interest groups rather a legitimate public purpose, due to a systemic failure of the political decision-making process. We therefore suggest that they should be scrutinized by the courts under the 'public use' requirement of the Takings Clause. To explain how we arrived at our proposed test, we shall start by discussing some straightforward alternatives.

At first glance, it may be argued that the influence of interest groups on the adoption of an anticompetitive measure, if it could be established, should suffice in and of itself to conclude that the measure in question simply fails to meet the public use requirement, as it is essentially aimed to promote the ends of private parties rather than its purported public ends. However, in order to discern when such measures should be seen as serving purely private ends, it is not enough to

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<sup>66</sup> Nedelsky, *supra* note 1, at 44.

<sup>67</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 501 (1973).



examine whether they were produced by the favored group's political influence. Rather, it is necessary to turn to substantive normative standards that determine what purposes, and under what conditions, may justify the distributive effects of the measure. Einer Elhauge, in his criticism of the use of interest group theory to justify more intrusive judicial review,<sup>68</sup> rightly argues that we cannot distinguish between proper and improper interest group influence without an independent normative baseline. For example, Elhauge demonstrates that normative standards of social desirability are required in order to judge the legitimacy of the political influence of a racial minority seeking to obtain affirmative action policy which will favor its members at the expense of the members of the diffuse racial majority.<sup>69</sup> Without a normative baseline, we cannot explain why some would view such political influence as legitimate while judging the influence of a wealthy minority seeking to prevent distributive public policy as illegitimate. Therefore, the fact of special interest influence on the adoption of a measure can only serve to justify a heightened level of scrutiny of the measure's purported purpose, but not to render the measure unjustified as such.

If so, to judge the permissibility of a particular anticompetitive measure under the public use requirement, we may need to ask whether the expected benefits of the measure outweigh its harm to the diffuse public's private property. Such a comparison of costs and benefits was suggested by Frank Michelman's economic analysis of the public use requirement.<sup>70</sup> According to Michelman, if the measure's benefits exceed its costs, including the costs of a hypothetical compensation scheme that would make the aggrieved parties indifferent to their loss, a court could determine that the measure meets the public use requirement. If the costs exceed the benefits, however, a court could determine that the measure does not pursue a public purpose.<sup>71</sup>

However, such a judicial test of public use is arguably impractical and undesirable. First, we may cast doubt on the competency of courts to measure the costs and benefits associated with anticompetitive government measures. Quantifying the loss incurred by consumers along with the efficiency losses associated with anticompetitive measures and weighing them against expected benefits which may be intangible and speculative, would require broad economic policy analysis, an expertise that judges may not possess. More importantly, such a comparison requires value judgments as to the worth of the measure's purported benefits and the permissibility of imposing any certain amount of loss on private parties for the sake of their attainment. These judgments must invoke and apply a conception of the legitimate functions and ends of government, a task that today's courts are reluctant to undertake.<sup>72</sup>

Indeed, since the demise of the *Lochner*<sup>73</sup> era and its interpretation of "substantive due process",<sup>74</sup> a time when economic regulations, including minimum wage and child labor laws, were struck

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<sup>68</sup> Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 YALE L.J. 31 (1993).

<sup>69</sup> *Id.* at 51-53.

<sup>70</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1195 (1967).

<sup>71</sup> *Id.*

<sup>72</sup> Thomas W. Merrill, *Economics of Public Use*, 72 CORNELL L. REV. 61, 66-68 (1986-1987).

<sup>73</sup> The period known in American legal history as the 'Lochner era' is named after the case of *Lochner v. New York* 198 U.S. 45 (1905).

<sup>74</sup> *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

down as unconstitutional, the Supreme Court stressed that it does not "sit as a superlegislature to weigh the wisdom of legislation,"<sup>75</sup> and held that legislative bodies should "have broad scope to experiment with economic problems."<sup>76</sup> The prevailing democratic theory holds that legislatures are the appropriate institution for the definition of the appropriate ends of government, and in the context of takings today's courts are "exceedingly deferential to legislative definitions of a permissible public use."<sup>77</sup> As Justice Douglas held in the case of *Berman v. Parker*: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."<sup>78</sup>

Interestingly, it could be argued that the ghost of *Lochner* is part of the reason why the problem of anticompetitive government measures remains unaddressed by courts until this day. The *Parker* decision that introduced the antitrust "state action doctrine" was a child of the post-*Lochner* and new deal era, which exhibited greater judicial deference to state regulation. Some have suggested that the doctrine "can be seen as a necessary concession to anticompetitive state regulation to avoid a return to the *Lochner* era."<sup>79</sup> Since then, lawyers such as Merrick Garland argued against the use of interest group theory to justify judicial scrutiny of anticompetitive economic regulation under federal antitrust law, asserting that this would amount to a dangerous return to *Lochnerism*.<sup>80</sup>

In light of, and in accord with, the prevailing deference of today's courts to legislative determinations of permissible government ends, we search instead for an alternative and arguably more appropriate framework that would allow judicial scrutiny of anti-competitive and arguably unconstitutional anticompetitive government measures under the Takings Clause. We believe that it is possible to formulate such a judicial test, that takes the permissibility of a measure's purported public purpose as given but does not abstain from ascertaining whether it is aimed to advance private rather than public ends. We draw upon Thomas Merrill's suggestion that the public use requirement could be reinterpreted to allow courts to scrutinize government's *choice of means* rather than the permissibility of the taking's ends.<sup>81</sup> Such a task is arguably more accurate and better suited to the institutional competency of courts, and hence more desirable under the prevalent theory of democratic governance.

The judicial test we propose for the review of anticompetitive government measures includes two prongs. First, the court should scrutinize the decision-making process to determine whether the adoption of the anticompetitive measure was influenced by special interests that stand to benefit from it. The court may consider evidence for the involvement of interest groups in the process, as well as their relationships with decision-makers who took part in the process. Evidence that

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<sup>75</sup> *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

<sup>76</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

<sup>77</sup> Merrill, *supra* note 72, at 63; For a recent example of the deferential interpretation of the public use requirement see *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

<sup>78</sup> 348 U.S. 26, 32 (1954).

<sup>79</sup> James C. Cooper & William E. Kovacic, *Antitrust Conference in Honor of Joseph Brodley: Panel III: Antitrust and the Obama Administration: U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U.L. REV. 1555, 1570 (2010)

<sup>80</sup> Merrick Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L. REV. 486, 490 (1987).

<sup>81</sup> Merrill, *supra* note 72, at 71.

decision-makers considered the anticompetitive effects of the measure, and the transparency of the process, may also be given weight by the reviewing court. Second, the court should scrutinize the choice of means available to the government. If the purported public purpose of the anticompetitive measure could be achieved by a less harmful means to the affected public, it could be concluded, even without clear and direct evidence, that the measure's real aim was to affect a private wealth transfer in violation of the public use requirement. Indeed, even if unintentional, an unnecessary transfer of wealth from some citizens to others should not be permitted by the constitution.

Invalidating anticompetitive government measures on the basis of the proposed test is justified by the contention that if a less harmful means was available to achieve the same purported purpose of the measure, and if the decision-making process that led to the adoption of the measure was tainted with the political influence of the benefitted party, the reasonable presumption is that the government measure transfers wealth from the diffuse public to the benefited party for the sake of the latter's purely private ends. Invalidation is the appropriate remedy for the elimination of those unjustified wealth transfers, as affording compensation to the members of the diffuse public is both impractical and undesirable – following a scheme of compensation, the diffuse public will nevertheless end up paying for the monopoly profits of the benefited interest group through their tax dollars. The more rigorous level of scrutiny is justified by the concern that due to the systemic failure of the political process, anticompetitive measures are likely to reflect the 'naked preferences' of interest groups while purporting to promote legitimate public purposes. As Sunstein argued, "Heightened scrutiny is triggered by a concern that in the circumstances it is especially likely that the measure under review reflects a naked preference,"<sup>82</sup> and is justified by the perception that the groups infringed upon "lack the political power to protect themselves against factional tyranny."<sup>83</sup> Accordingly, the court may review "government claims that a public value is being served,"<sup>84</sup> inter-alia by searching for less restrictive alternatives in which government could have promoted the public value, seeing that the "availability of such alternatives [...] suggests that the public value justification is a façade."<sup>85</sup>

Our proposed judicial test is not only pertinent but also practical. The task of deciding whether government measures have an anticompetitive effect is clearly within the capacity of courts, as they are routinely tasked with such analysis in the context of antitrust law; deciding whether an interest group was behind a particular anticompetitive measure is also within the reach of courts, as demonstrated in several judgments that reflected no hesitation to identify such influences;<sup>86</sup> and courts are experienced with determining whether government employed the least restrictive means

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<sup>82</sup> Sunstein, *Naked Preferences* *supra* note 8, at 1700.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1699.

<sup>85</sup> *Id.*

<sup>86</sup> For example *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 115-16 (1978) (Justice Stevens' dissenting finding that a California regulation, allowing incumbent auto dealers to delay the entry of competing franchises to their market, was the result of successful lobbying by auto dealers for an anticompetitive benefit; However, the court upheld the regulation, holding among other things that the Parker state action doctrine exempts it from the reach of antitrust laws: *Id.* at 109); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 129-34 (1978) (upholding a statute barring oil company ownership of service stations while acknowledging that the statute was the product of successful lobbying by retail gasoline dealers seeking competition restraints).

in various constitutional contexts.<sup>87</sup> As Krier and Steric have shown,<sup>88</sup> in adjudicating takings cases, state courts scrutinize the political processes that had generated government regulation and are likely to find takings in cases in which the government actors responsible for harm to landowners are least likely to be politically accountable.

The feasibility of implementing our proposal can also be demonstrated by numerous incidents where the FTC intervened in the process of regulation by advocating against anticompetitive government measures that would unnecessarily inflict economic harms on the diffuse public.<sup>89</sup> These interventions show that it is possible to objectively identify anticompetitive measures and to ascertain whether less restrictive means are available to achieve their purported public goals. For example, the FTC warned several state legislatures against promulgating certain statutory exemptions to antitrust laws that would have allowed physicians to collectively bargain with managed health plans. Drawing on evidence from similar cases, the FTC concluded that such exemptions would lead to an anticompetitive outcome, increasing costs and limiting consumer access to care, and argued that the measure is not likely to achieve its purported public purpose of improving the quality of care, which according to their analysis "could be accomplished through less anticompetitive means".<sup>90</sup> In another instance, the FTC convinced the governor of New York to veto a so-called "sale below cost" bill that would have prohibited crude oil producers and refiners from selling motor fuels below refiner costs, thereby restraining competition between these suppliers, and possibly harming consumers without providing a countervailing benefit.<sup>91</sup> The FTC's comments argued that the public purpose of the measure, which was actually to protect competition, could be achieved by less anticompetitive means through existing federal antitrust law.<sup>92</sup> The FTC's intervention in these and in other cases shows that it is possible to objectively demonstrate the existence of the elements of the proposed test.<sup>93</sup>

A possible objection that can be raised against our proposal is that the judicial review of anticompetitive measures may suffer from the very same failure that inheres in the political system. Although the judiciary is the branch of government least susceptible to interest group influence, it is not clear that the diffuse group of citizens is more capable of overcoming its collective action problem in courts than it is in the public political process. One could argue that challenges to anticompetitive government measures would rarely make it to courts. That is because such measures would remain below the radar of the harmed individuals or because challenging such measures would require some sacrifice by some of the harmed individuals whereas the benefit

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<sup>87</sup> Such an inquiry is also the task of international tribunals who, under the rules of international trade law, are called upon to assess whether domestic interest groups obtained regulation to limit imports that are "more trade-restrictive than necessary to fulfil a legitimate objective" (Article 2.2. of the World Trade Organization's Agreement on Technical Barriers to Trade).

<sup>88</sup> James E. Krier and Stewart E. Streck, *An Empirical Study of Implicit Takings*, 58 Wm. & Mary L. Rev. 66 (2016).

<sup>89</sup> See FTC, REPORT OF THE STATE ACTION TASK FORCE 66-71 (2003).

<sup>90</sup> *Id.* at 67.

<sup>91</sup> See Deborah Platt Majoras, *State Intervention: A State of Displaced Competition*, 13 GEO. MASON L. REV. 1175, 1184 (2006).

<sup>92</sup> FTC, FTC STAFF COMMENT TO THE HONORABLE GEORGE E. PATAKI CONCERNING NEW YORK BILL NOS. S04522 AND A06942 REGULATING GASOLINE SALES (2002).

<sup>93</sup> See Majoras, *supra* note 91, at 1182-1186 (2006); See also Muris, *supra* note 32.

would spread to the entire diffuse group of consumers at a low reward per capita. That would make it irrational for individual members of the group to bear the costs of litigation.

Indeed, the collective action problem inherent in the costs of litigating such cases calls for attention. However, relatively speaking, courts pose to diffuse plaintiffs much simpler barriers to collective action than does the political process. Crowdfunding<sup>94</sup> and class actions<sup>95</sup> could be successfully used to facilitate overcoming these barriers. Besides that, we believe that the effects of the availability of the proposed framework of judicial review goes beyond the particular challenges to anticompetitive measures that could be brought under it. The remedy of *ex-post* invalidation of anticompetitive government measures is aimed to preempt this type of interested wealth transfers and to mitigate the capture failure *ex-ante*. The availability of judicial review that could invalidate such measures should impel decision-makers to conduct more inclusive and transparent decision-making processes, to give weight to the interests of the diffuse public in competitive prices, and to reduce the involvement of special interest groups in the shaping of public policy that affects the diffuse public. The requirement that the decision-making process take competition into account should give the federal antitrust agencies more tools to challenge anticompetitive decisions before they are adopted and should produce more public information that could assist the diffuse citizens in overcoming their collective action problem and empowering them to influence public decisions through the political process.

#### IV - Conclusion

In this Essay we argued that the jurisprudence on takings must extend to apply the Takings Clause to the protection of the diffuse majority of citizens from regulations that transfer wealth to special interests who manage to shape governmental anti-competitive measures. Our point of departure was the observation that the political system is prone to systemically produce purely private wealth transfers from the diffuse majority to concentrated interest groups due to the disparity of political power between the parties. Due to this systemic failure, it is justified – and consistent with the original intent of the Framers – to afford heightened constitutional protection to the property interests of the diffuse public. Conceptualizing the purchasing power of citizens' disposable income as constitutionally protected property, could safeguard it against regulatory measures that cater to special interests.

One may ask why this proposition has not emerged before. Surely, this cannot be attributed solely to the rigidity of the takings doctrine. After all, while the Takings Clause was originally intended and interpreted to apply only to physical dispossession, the concept of 'regulatory takings' has ultimately been recognized in the jurisprudence.<sup>96</sup> Additionally, property rights were invoked in

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<sup>94</sup> See Ronen Perry, Crowdfunding Civil Justice, 59 B.C.L. Rev. 1357 (2018).

<sup>95</sup> See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, University of Chicago Legal Forum: Vol. 2003: Iss. 1, Article 4. Available at: <http://chicagounbound.uchicago.edu/uclf/vol2003/iss1/4>.

<sup>96</sup> See *supra* note 44.

political resistance to environmental regulations that restricted land use and indirectly decreased property value.<sup>97</sup> Despite all these, the concept of ‘regulatory taking’ as a ‘taking’ was never extended beyond the protection of certain politically savvy and influential sectors.

We believe that the constitutional void that this Essay has identified in the constitutional protection of the majority’s property could be explained by the same collective action problem that precluded the diffuse public from influencing government. Whereas heterogenic and relatively small groups of actors have always been able to mobilize political power to protect their property, the large and diffuse group of citizens who wish to benefit from price and choice available in competitive markets could not overcome the collective action problem of comprehending the source of their loss, let alone to name it and to collectively demand its protection under the law. This is nothing new, of course. Property rights were always defined also in the ‘political market’, where different groups possess varying degrees of influence, and not only in the economic market.<sup>98</sup> Historically, as Mancur Olson elaborates in *The Rise and Decline of Nations*, because smaller groups could organize themselves more quickly than their opponents within the nascent Westphalian system of sovereign states, they were able to use the state as the instrument for obtaining a disproportionate share of the domestic resources.<sup>99</sup>

Perhaps more fundamentally, it might be the case that the same collective action problem prevented the group of diffuse citizens from conceptualizing their economic interests as rights entitled to constitutional protection. An interesting contemporary analogy of failure to articulate entitlements can be drawn from Eric Posner’s and Glen Weyl’s recent proposal to reconceptualize data in the digital market as owned by the users rather than by the social media and other companies that provide users services “for free” while selling the data to third parties.<sup>100</sup> So far the market remains at that equilibrium as consumers are not aware of the value of the data they are producing and even if they are, they struggle to act in unison to demand their share from the service providers. As in the case of consumer data, reconceptualizing the claim to protecting competitive markets as supported under the constitution can help members of diffuse groups to overcome the problem of collective action and demand what is theirs.

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<sup>97</sup> Several states introduced legislation that protected owners from decreasing value as a result of regulation. For more on the ‘property rights movement’ see: PHILIP BRICK & MCGREGGOR CAWLEY, *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* (1996); BRUCE YANDLE, *LAND RIGHTS: THE 1990’S PROPERTY RIGHTS REBELLION* (1995); Harvey M. Jacobs, *Introduction: Is All That Is Solid Melting into Air?*, in *PRIVATE PROPERTY IN THE 21<sup>ST</sup> CENTURY* 1, 2 (Harvey M. Jacobs ed., 2003); Alfred M. Olivetti & Jeffrey Worsham, *THIS LAND IS YOUR LAND, THIS LAND IS MY LAND: THE PROPERTY RIGHTS MOVEMENT AND REGULATORY TAKINGS* (2003).

<sup>98</sup> See Eyal Benvenisti, *Sovereignty and the Politics of Property*, 18 THEOR. INQ. LAW 447 (2017).

<sup>99</sup> MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* ch. 3 (1982).

<sup>100</sup> ERIC POSNER & GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY*, 205-249 (2018).